

No. 83-610

Office - Supreme Court, U.S.

FILED

NOV 14 1983

ALEXANDER L. STEVART
CLERK

In The
Supreme Court of the United States
October Term, 1983

BABBITT FORD, INC.,
an Arizona Corporation,

Petitioner,

vs.

THE NAVAJO INDIAN TRIBE,
through its Chairman, Peterson Zah, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

JOHN, A. MACKINNON
ELIZABETH BERNSTEIN
NAVAJO NATION
Department of Justice
Post Office Drawer 2010
Window Rock, Arizona 86515
Telephone: (602) 871-6931-6934

Attorneys for Respondents

QUESTIONS PRESENTED

1. Whether the Navajo Tribe retains the inherent sovereign power to regulate the on-reservation commercial activities of non-Indians?
2. Whether the treaties between the Navajo Tribe and the United States divest the Navajo Tribe of all civil jurisdiction over non-Indians?

TABLE OF CONTENTS

	Page(s)
Questions Presented _____	i
Table of Cases, Statutes and Other Authorities _____	ii
Opinions Below _____	1
Jurisdiction _____	2
Statutory Provisions Involved _____	2
Argument:	
I. Introduction _____	4
II. The decision of the Ninth Circuit that the Navajo Tribe retains civil jurisdiction over non-Indians is correct and does not conflict with other relevant decisions. _____	5
III. The Navajo Treaties do not divest the Navajo Tribe of civil jurisdiction over the petitioner. _____	10
Conclusion _____	12

TABLE OF CASES, STATUTES AND OTHER AUTHORITIES

CASES

<i>American Indian Agricultural Credit Consortium, Inc. v. Fredricks</i> , 551 F. Supp. 1020 (D. Colo. 1982) _____	8
<i>Annis v. Dewey County Bank</i> , 335 F. Supp. 133 (D. S. D. 1971) _____	10
<i>Babbitt Ford, Inc. v. Navajo Tribe</i> , 710 F. 2d 587 (9th Cir. 1983) _____	passim
<i>Brown v. Babbitt Ford, Inc.</i> , 117 Ariz. 192, 571 P. 2d 689 (Ariz. App. 1977) _____	8
<i>Cardin v. De La Cruz</i> , 671 F. 2d 363 (9th Cir. 1982), cert. denied, — U. S. —, 103 S. Ct. 293 (1982) _____	7

TABLE OF AUTHORITIES—Continued

	Page(s)
<i>Confederated Salish and Kootenai Tribes v. Namen</i> , 665 F. 2d 951 (9th Cir. 1982), <i>cert. denied</i> — U. S. —, 103 S. Ct. 314 (1982) _____	7
<i>Cowan v. Rosebud Sioux Tribe</i> , 404 F. Supp. 1338 (D. S. D. 1975) _____	8
<i>Duluth Lumber and Plywood Company v. Delta De- velopment, Inc.</i> , 281 N. W. 2d 377 (Minn. 1979) _____	8
<i>Enriquez v. Superior Court</i> , 115 Ariz. 342, 565 P. 2d 522 (Ariz. App. 1977) _____	8
<i>Francisco v. State</i> , 113 Ariz. 427, 556 P. 2d 1 (1976) _____	9
<i>Fuentes v. Shevin</i> , 407 U. S. 67 (1972) _____	4
<i>Hot Oil Service, Inc. v. Hall</i> , 366 F. 2d 295 (9th Cir. 1966) _____	7
<i>Joe v. Marcum</i> , 621 F. 2d 358 (10th Cir. 1980) _____	10
<i>Knight v. Shoshone and Arapahoe Indian Tribes</i> , 670 F. 2d 900 (10th Cir. 1982) _____	7
<i>Little Horn State Bank v. Stops</i> , 555 P. 2d 211 (Mont. 1976) _____	9
<i>McClanahan v. Arizona State Tax Commission</i> , 411 U. S. 164 (1973) _____	10, 11
<i>Merrion v. Jicarilla Apache Tribe</i> , 455 U. S. 130 (1982) _____	6, 7, 9
<i>Montana v. United States</i> , 450 U. S. 544 (1981) _____	6, 7, 11
<i>National Farmers Union Insurance Company v. Crow Tribe of Indians</i> , 560 F. Supp. 213 (D. Mont. 1983) _____	9
<i>Nelson v. Dubois</i> , 232 N. W. 2d 54 (N. D. 1975) _____	8
<i>Oliphant v. Suquamish Indian Tribe</i> , 435 U. S. 191 (1978) _____	6
<i>Santa Clara Pueblo v. Martinez</i> , 436 U. S. 49 (1978) _____	11

TABLE OF AUTHORITIES—Continued

	Page(s)
<i>Schantz v. White Lightning</i> , 231 N. W. 2d 812 (N. D. 1975) _____	8
<i>Schantz v. White Lightning</i> , 502 F. 2d 67 (8th Cir. 1974) _____	7
<i>State v. Red Lake D. F. L. Committee</i> , 303 N. W. 2d 54 (Minn. 1981) _____	8
<i>UNC Resources, Inc. v. Benally</i> , 514 F. Supp. 358 (D. N. M. 1981) _____	9
<i>UNC Resources, Inc. v. Benally</i> , 518 F. Supp. 1046 (D. Ariz. 1981) _____	9
<i>United States v. Mazurie</i> , 419 U. S. 544 (1975) _____	6
<i>United States v. Wheeler</i> , 435 U. S. 313 (1978) _____	6, 10, 11
<i>Washington v. Confederated Tribes of the Col- ville Indian Reservation</i> , 447 U. S. 134 (1980) _____	7
<i>White Mountain Apache Tribe v. Bracker</i> , 448 U. S. 136 (1980) _____	9
<i>Williams v. Lee</i> , 358 U. S. 217 (1959) _____	6, 7, 10, 11
<i>Worcester v. Georgia</i> , 31 U. S. (6 Pet.) 515 (1832) —	6

STATUTES

25 U. S. C. §§ 1321-1326 _____	9
28 U. S. C. § 1254(1) _____	2
7 N. T. C. § 607 _____	2, 3, 4, 10
7 N. T. C. § 608 _____	2, 3, 4, 10
7 N. T. C. § 609 _____	2, 3, 4, 10
17 N. T. C. §§ 1903-1906 _____	3
La. Code Civ. Pro. art. 2631 <i>et seq.</i> _____	5

TABLE OF AUTHORITIES—Continued

	Page(s)
La. Code Civ. Pro. art. 851 <i>et seq.</i> _____	5
Wisconsin Consumer Act, W. S. A. §§ 425.206, 425.305	5
OTHER AUTHORITIES	
7 Op. Att'y Gen. 174, 177, 178 (1855) _____	6
23 Op. Att'y Gen. 214 (1900) _____	6
55 Interior Dec. 14 (1934) _____	6
Op. Sol. Int., Oct. 13, 1976 _____	6
Model Consumer Credit Act § 7.202 _____	5
Navajo Treaty of 1868, Article II _____	6
The National Commission for Consumer Finance, <i>Consumer Credit in the United States</i> (1972) _____	4
National Consumer Act §§ 5.204, 5.208 _____	5
S. Rep. No. 698, 45th Cong., 3rd Sess. (1879) _____	7
F. Cohen, <i>Handbook of Federal Indian Law</i> , (1982 ed) _____	7
Grau & Whitford, <i>The Impact of Judicializing Re- possession: The Wisconsin Consumer Act Re- visited</i> , 1978 Wis. L. Rev. 983 (1978) _____	5
Whitford & Laufer, <i>The Impact of Denying Self- Help Repossession of Automobiles: A Case Study of the Wisconsin Consumer Act</i> , 1975 Wis. L. Rev. 607 (1975) _____	5

No. 83-610

In The
Supreme Court of the United States
October Term, 1983

BABBITT FORD, INC.,
an Arizona Corporation,

Petitioner,

vs.

THE NAVAJO INDIAN TRIBE,
through its Chairman, Peterson Zah, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals (Petitioner's Appendix (Pet. App.) 1-24) is reported at 710 F. 2d 587-601 (9th Cir. 1983). The opinion of the United States District Court for the District of Arizona (Pet. App. 26-52) is reported at 519 F. Supp. 418-434 (D. Ariz. 1983).

JURISDICTION

The Judgment of the Ninth Circuit Court of Appeals was entered on July 15, 1983. No petition for rehearing was filed. The jurisdiction of this Court is invoked by the Petitioners under 28 U. S. C. Sections 1254(1).

STATUTORY PROVISIONS INVOLVED

The Navajo law, Title 7, Navajo Tribal Code, §§ 607-609 (7 N. T. C. §§ 607-609) provides:

§ 607. Repossession of
personal property

The personal property of Navajo Indians shall not be taken from land subject to the jurisdiction of the Navajo Tribe under the procedures of repossession except in strict compliance with the following: (1) Written consent to remove the property from land subject to the jurisdiction of the Navajo Tribe shall be secured from the purchaser at the time repossession is sought. The written consent shall be retained by the creditor and exhibited to the Navajo Tribe upon proper demand. (2) Where the Navajo refuses to sign said written consent to permit removal of the property from land subject to the jurisdiction of the Navajo Tribe, the property shall be removed only by order of a Tribal Court of the Navajo Tribe in an appropriate legal proceeding. (Navajo Tribal Council Resolution CF-26-68, February 7, 1968).

§ 608. Violations — Penalty

(a) Any non-member of the Navajo Tribe, except persons authorized by Federal law to be present on Tribal land, found to be in wilful violation of 7

N. T. C. § 607 may be excluded from land subject to the jurisdiction of the Navajo Tribe in accordance with the procedure set forth in 17 N. T. C. §§ 1903-1906.

(b) Any business whose employees are found to be in wilful violation of 7 N. T. C. § 607 may be denied the privilege of doing business on land subject to the jurisdiction of the Navajo Tribe.

(c) Any Indian who violates any provision of 7 N. T. C. § 607 shall be guilty of a crime, and upon conviction shall be punished by a fine of not more than \$100. (Navajo Tribal Council Resolution CF-26-68, February 7, 1968).

§ 609. Civil liability.

Any person who violates 7 N.T.C. § 607 and any business whose employee violates such section is deemed to have breached the peace of lands under the jurisdiction of the Navajo Tribe, and shall be civilly liable to the purchaser for any loss caused by the failure to comply with 7 N. T. C. §§ 607-609.

If the personal property repossessed is consumer goods (to wit: goods used or bought for use primarily for personal, family or household purposes), the purchaser has the right to recover in any event an amount not less than the credit service charge plus 10% of the principal amount of the debt or the time price differential plus 10% of the principal amount of the debt or the time price differential plus 10% of the cash price.

Purchaser means the person who owes payment or other performance of an obligation secured by personal property, whether or not the purchaser owns or has rights in the personal property. (Navajo Tribal Council Resolution CJN-53-69, June 4, 1969).

Relevant portions of the Navajo Treaties are set forth in the Petitioner's brief.

I. Introduction

The Petitioner has grossly exaggerated the effect which the Navajo laws at issue have upon various commercial transactions. Pursuant to 7 N.T.C. § 607-609, the Navajo Tribe merely seeks to limit the use of "self-help" repossession to those cases in which the debtor does not dispute the retaking of his property, as evidenced by his written consent. In those cases in which the debtor disputes the repossession, the Navajo law requires that this dispute be resolved in a judicial forum. There are ample safeguards to insure that the judicial proceeding is neither costly nor time-consuming and that the security is protected during the course of this proceeding. See, "Rules of Pleading, Practice and Procedure for Repossession of Personal Property," Navajo Nation Judicial Rules. The Navajo repossession law merely injects some minimal due process into a conflict that is frequently otherwise resolved in other jurisdictions by the use of force, stealth, or deceit. By requiring that conflicts be resolved in the courtroom rather than in the street, this law insures that lives and property are protected, prevents sharp credit practices, and promotes the general welfare of the Navajo people.

The propriety of non-judicial repossessions has been increasingly questioned in recent years. As this Court has noted, an opportunity to be heard prior to the loss of property can prevent "substantially unfair and simply mistaken deprivations of property." *Fuentes v. Shevin*, 407 U.S. 67, 81-82 (1972). A number of groups which have studied the issue have recommended that the "self-help" remedy be prohibited by law. See e.g., The National Commission for Consumer Finance, *Consumer*

Credit in the United States (1972); National Consumer Act §§ 5.204, 5.208; Model Consumer Credit Act § 7.202. The State of Wisconsin has enacted legislation which, like the Navajo law, prohibits self-help repossession. See Wisconsin Consumer Act, W. S. A. §§ 425.206, 425.305. The State of Louisiana also prohibits non-judicial repossession. La. Code Civ. Pro. art. 2631 *et seq.* and art. 851 *et seq.* Those commentators who have reviewed the effects of such legislation have concluded that it has not had an adverse effect upon the availability of credit, and that it has resulted in an increase in negotiated settlements, to the economic advantage of both parties. Whitford & Laufer, *The Impact of Denying Self-Help Repossession of Automobiles: A Case Study of the Wisconsin Consumer Act*, 1975 Wis. L. Rev. 607 (1975); Grau & Whitford, *The Impact of Judicializing Repossession: The Wisconsin Consumer Act Revisited*, 1978 Wis. L. Rev. 983 (1978).

The Petitioner's conjectures as to the possible drastic impacts which may result from this law and its significance to national consumer credit practices are wholly without foundation. The law at issue is a reasonable means to protect the health and welfare of the Navajo people and all of those subject to the jurisdiction of the Navajo Tribe.

II. The decision of the Ninth Circuit that the Navajo Tribe retains civil jurisdiction over non-Indians is correct and does not conflict with other relevant decisions.

The decision of the Ninth Circuit is derived directly from longstanding authority which recognizes Indian

tribes as being "distinct, independent political communities, retaining their original natural rights" in matters of local government. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832); *United States v. Mazurie*, 419 U.S. 44 (1975). The Navajo Tribe has been acknowledged to retain the power to be governed by its own laws, and to enforce those laws in its own forums. *Williams v. Lee*, 358 U.S. 217 (1959). The Navajo Tribe is also acknowledged to possess attributes of sovereignty over both its members and its territory. *United States v. Wheeler*, 435 U.S. 313, 323 (1978).

Tribal civil authority over non-Indians is derived not only from the inherent powers necessary to self-government and territorial management, but also from the power to exclude non-members from tribal land. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 141-144 (1982); see also, Navajo Treaty of 1868, Article II. In the exercise of this sovereign power, the Navajo Tribe has the power to place conditions on entry to its lands, on the continued presence there, and on reservation conduct. *Id.* at 144-145. At issue is nothing more than the legitimate exercise of these powers.

The exercise of Navajo sovereign power is not prohibited by this Court's decisions in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) or *Montana v. United States*, 450 U.S. 544 (1981). There is no criminal jurisdictional issue involved here and by the very analysis employed in *Oliphant*, this exercise of jurisdiction must be affirmed. The civil authority of Indian tribes over non-Indians has long been upheld by the Executive Branch,¹

¹⁷ Op. Att'y Gen. 174, 177, 178 (1855); 23 Op. Att'y Gen. 214 (1900); 55 Interior Dec. 14, 50 (1934); Op. Sol. Int. Oct. 13, 1976.

Congress,² and the opinions of this Court. *Merrion v. Jicarilla Apache Tribe*, *supra*; *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980); *Williams v. Lee*, *supra*. The tests employed in *Montana v. United States*, *supra* to determine the extent of Indian jurisdiction over non-Indian use of fee lands within a reservation are also met. At issue is the regulation of the on-reservation commercial activities of non-Indians who enter into consensual relationships with tribal members. *Compare Id.* at 565-566. The Court below also concluded that this legislation is designed to keep reservation peace and protect the health and safety of tribal members. *Babbitt Ford, Inc. v. Navajo Tribe*, 710 F.2d 587, 593 (9th Cir.1983). The conduct so regulated clearly "threatens or has some direct effect on the . . . economic security, or the health or welfare of the Tribe." *Compare, Montana v. United States*, 450 U.S. at 566.

Furthermore, the decision of the Ninth Circuit is in accord with earlier decisions from that Court, as well as from other jurisdictions, which have upheld tribal sovereignty. *See, eg., Cardin v. De La Cruz*, 671 F.2d 363 (9th Cir. 1982) *cert. denied*, — U.S. —, 103 S. Ct. 293 (1982); *Confederated Salish and Kootenai Tribes v. Namen*, 665 F.2d 951 (9th Cir. 1982); *cert. denied* — U.S. —, 103 S. Ct. 314 (1982); *Knight v. Shoshone and Arapahoe Indian Tribes*, 670 F.2d 900 (10th Cir. 1982); *Schantz v. White Lightning*, 502 F.2d 67, 70 (8th Cir. 1974); *Hot Oil Serv-*

²S. Rep. No. 698, 45th Cong., 3rd Sess. 1-2 (1879); Compare also the extensive legislation in the criminal area and the complete absence of federal legislation in the civil area. *See, F. Cohen, Handbook of Federal Indian Law*, (1982 ed.) at 253.

ice, Inc. v. Hall, 366 F. 2d 295 (9th Cir. 1966); *Cowan v. Rosebud Sioux Tribe*, 404 F. Supp 1338 (D.S.D. 1975); *Enriquez v. Superior Court*, 115 Ariz. 342, 565 P. 2d 522 (Ariz. App. 1977); *Schantz v. White Lightning*, 231 N. W. 2d 812 (N. D. 1975); *Nelson v. Dubois*, 232 N. W. 2d 54 (N. D. 1975).

The cases offered by the Petitioner as being in conflict with this decision of the Ninth Circuit simply are not. In *Brown v. Babbitt Ford, Inc.*, 117 Ariz. 192, 571 P. 2d 69 (Ariz. App. 1977), the Arizona Court of Appeals expressly reserved judgment on the questions decided by the Ninth Circuit in the present case. The Arizona court stated that the issues of whether the Navajo Tribe has jurisdiction over non-Indians, whether Tribal Court judgments based on the repossession law would be valid in Arizona, and whether the State could enforce its own laws on the Reservation, were not before it. *Id.* at 691. At issue was merely a conflict of laws question, resolved under Arizona law by the language of the contract at issue.

American Indian Agricultural Credit Consortium, Inc. v. Fredricks, 551 F. Supp. 1020 (D. Colo. 1982) merely raised a federal diversity jurisdiction question. The Court held that the absence of state jurisdiction, due to Indian sovereignty, did not necessarily imply that the Federal Court could not obtain Federal diversity jurisdiction over the dispute. This conclusion is in no way inconsistent with the decision at issue.

Nor do the Minnesota decisions upon which Petitioner seeks to rely have application to this case. *Duluth Lumber and Plywood Company v. Delta Development, Inc.*, 281 N. W. 2d 377 (Minn. 1979); *State v. Red Lake D. F. L.*

Committee, 303 N.W. 2d 54 (Minn. 1981). Minnesota, unlike Arizona, is a Public Law 280 state. It has assumed various responsibilities for the reservations within its borders and has been federally authorized to exercise jurisdiction over them. 25 U.S.C. §§ 1321-1326. Arizona has not done the same, and its jurisdiction is necessarily limited. *Francisco v. State*, 113 Ariz. 427, 556 P. 2d 1 (1976). Therefore, the conclusions of the cases cited by Petitioner as to the effect of state law on Indian reservations in Minnesota have no application to the Arizona situation and do not conflict with the holding of the Ninth Circuit.

Those cases relied upon by the Petitioner which limit tribal jurisdiction to the territory of the Tribe are readily distinguishable on that basis. *National Farmers Union Insurance Company v. Crow Tribe of Indians*, 560 F. Supp. 213 (D. Mont. 1983); *UNC Resources, Inc. v. Benally*, 514 F. Supp. 358 (D.N.M. 1981); *UNC Resources, Inc. v. Benally*, 518 F. Supp. 1046 (D. Ariz. 1981). These Respondents agree that there is "a significant geographical component to tribal sovereignty." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 151 (1980); *accord, Merrión v. Jicarilla Apache Tribe*, 455 U.S. 130, 142 (1982). However, in the situation at issue, all of the relevant events occurred within the exterior boundaries of the Navajo Nation. The repossession was on Tribal land, the adversely affected parties are members of the Tribe, the property was located on the Reservation, and all possible adverse effects to health, safety and other property would occur on the Reservation.

The decision in *Little Horn State Bank v. Stops*, 555 P. 2d 211 (Mont. 1976) is also distinguishable. In that case, the Montana Supreme Court concluded that a writ

of execution from the State Court was valid when levied against Indian property located on an Indian Reservation. Because the Crow Tribe had no applicable laws nor any legal forum available for this matter, the Court concluded that such action did not interfere with tribal self-government. It must be noted that the Navajo Tribal Courts do recognize and enforce foreign judgments and that the Navajo Nation has legislated comprehensively with regard to the procedures for repossession. 7 N.T.C. §§ 607-609. Therefore, the Montana rationale would not be applicable here. It should also be noted that the reasoning of the Montana Court has been rejected by other Courts which have considered similar situations. *See, Joe v. Marcum*, 621 F. 2d 358, 362 (10th Cir. 1980); *Annis v. Dewey County Bank*, 335 F. Supp. 133 (D. S. D. 1971).

The decision of the Ninth Circuit is correct and in accord with all relevant precedent.

III. The Navajo Treaties do not divest the Navajo Tribe of civil jurisdiction over the Petitioner.

Petitioner's treaty interpretations cannot be reconciled with the basic principles of Indian law. As the Ninth Circuit noted, "the law is settled that simply because a treaty fails to delineate specific powers of a tribe does not mean that the tribe has been divested of such powers." *Babbitt Ford, Inc. v. Navajo Indian Tribe*, *supra* at 596, citing *United States v. Wheeler*, 435 U.S. 313 (1978); *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973); *Williams v. Lee*, 358 U.S. 217 (1959). A treaty is "not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted." *United States v. Wheeler*, 435 U.S. at 327 n.

24. Moreover, the Courts will not acknowledge an intent to restrict tribal sovereignty unless that intent is clear. *Santa Clara Pueblo v. Martinez*, 436 U. S. 49, 59 (1978). Any doubtful expressions are to be interpreted in favor of the Indians. *McClanahan v. Arizona State Tax Commission*, *supra* at 174.

Petitioners have pointed to no single treaty provision which removes the jurisdiction at issue from the Navajo Tribe. Nor, contrary to Petitioner's assertions, have any of the numerous courts which have reviewed these provisions held that these treaties divest any form of jurisdiction. That the treaties may create concurrent Federal jurisdiction does not imply that Tribal jurisdiction is abolished. *United States v. Wheeler*, 435 U. S. 313 (1978). Nor does Petitioner's extensive discussion of the law applicable to Indians who chose to settle off the reservation in any way limit the on-reservation powers of the Tribe. The interpretations proposed by the Petitioners cannot be reconciled with the previous interpretations of these same treaties made in *United States v. Wheeler*, 435 U. S. 313 (1978); *McClanahan v. Arizona State Tax Commission*, 411 U. S. 164 (1973); and *Williams v. Lee*, 358 U. S. 217 (1959) nor of the identical language in the Crow treaty at issue in *Montana v. United States*, 450 U. S. 544 (1981). Petitioner's arguments simply have no merit.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the Ninth Circuit should be denied.

Respectfully submitted,

JOHN A. MACKINNON
ELIZABETH S. BERNSTEIN

NAVAJO NATION
Department of Justice
Post Office Drawer 2010
Window Rock, AZ. 86515
Tel. (602) 871-6931-6934

Attorneys for Respondents